

5 May 1988
OCA 88-1429

MEMORANDUM FOR THE RECORD

FROM: [REDACTED], Legislation Division
Office of Congressional Affairs

SUBJECT: Justice Views Letter on H.R. 1212, Polygraph Bill

1. On 4 May 1988, I spoke with Branden Blum, legislative attorney, Office of Management and Budget.

2. I told him the Agency had no objection to the draft Department of Justice views letter on H.R. 1212, the Polygraph Protection Act (attached).

3. He noted this. He went on to say that because of continuing disagreement within the Administration on this bill, it was not certain the letter would ever be cleared for release or that Justice would prevail upon the President to veto the bill, were it to emerge from conference and be passed by both houses.

Attachment

OCA/LEG [REDACTED] (5 May 1988)

Distribution:

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Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Hon. Edward M. Kennedy
Chairman
Committee on Labor and Human Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This letter sets forth the views of the Department of Justice on the legislation currently before the Congress to regulate the use of polygraph tests, H.R. 1212, the "Employee Polygraph Protection Act," as passed by the House, and S. 1904, the "Polygraph Protection Act of 1987," as passed by the Senate. As you know, H.R. 1212 would almost entirely forbid the use of polygraphs or "lie detectors" in the private employment setting. S. 1904 would allow some use of the polygraph to investigate individual cases of misconduct, but would prohibit their use as pre-employment screening devices in most instances by private employers, with certain very limited exceptions. The conduct of those examinations allowed by S. 1904 would be heavily regulated, as would the qualifications of polygraph examiners.

The Department of Justice is vigorously opposed to the enactment of these bills into law. On March 5, 1987, Assistant Attorney General Stephen J. Markman testified on behalf of the Department before the Employment Opportunities Subcommittee of the House Education and Labor Committee concerning H.R. 1212. At that time, he expressed our opposition to the bill, and the reasons for this opposition. While different from H.R. 1212 in certain respects, S. 1904 presents identical problems. A copy of Assistant Attorney General Markman's testimony is attached. 1/

1/ H.R. 1212 passed the House of Representatives with a few limited exceptions, but those changes did nothing to respond to the concerns raised in Assistant Attorney General Markman's testimony. S. 1904 passed the Senate, again with
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We oppose H.R. 1212 and S. 1904 because both bills are fundamentally at odds with the stated positions of this Administration on federalism and the free market. Both bills would preempt state polygraph regulation, which is currently vigorous and effective, and would unnecessarily intrude the federal government yet again into the relationship between employer and employee in the private marketplace.

In brief, we believe that any regulation of private polygraph usage should take place at the state rather than the federal level. 2/ Until now, regulating polygraph use has been the responsibility of the states; in fact, at least forty-five states and the District of Columbia have enacted statutes regulating the use of polygraph or other "honesty" tests or polygraph examiners in some manner. Important principles of federalism require us to oppose federal government intervention in matters that traditionally have been the responsibility of the states where there is no evidence of an overriding need for national policy uniformity.

It is the states that are charged with protecting the health, safety, and welfare of their citizens. They uniquely possess the resources and competence to discern the conditions, needs, and desires of their citizens on these issues and to enact laws to address those concerns. 3/ To preempt the states in this context would do violence to an important underlying principle of our union -- the belief in the ability and responsibility of the

1/ (...continued)

a few limited exceptions, but also fails to address our concerns.

2/ To the extent that supporters of federal polygraph regulation rely upon the supposed phenomenon of intra-company reassignments of employees to states with lax polygraph regulations in order to avoid polygraph regulations in other states, that perceived problem -- if it exists at all -- could be dealt with through far more narrowly tailored legislation to prohibit such tactics when used for the purpose of avoiding the laws of the state in which employees are regularly assigned.

3/ To illustrate by example, there may be states in which fidelity bond premiums for employees in trusted positions are kept low because underwriters are permitted to use polygraph analysis. Such states could decide that their overall needs would best be served by continuing to permit polygraph use in such circumstances; states should be left free to take an essentially local condition such as this into account in regulating polygraph use.

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states generally to govern the affairs of their citizens. Certainly federalism cannot be salvaged by the one-way ratchet savings provision found in § 10 of S. 1904, which preempts state law that is less stringent than the requirements created by the bill, but allows state regulation that is more stringent.

Polygraph regulation is a complex and emotional issue which poses a number of questions with no definitive answers. It is an issue that requires careful balancing of the interests of consumers, employees, and employers, making it precisely the type of issue in which a diversity of responses, providing alternative solutions to differing situations and ensuring the ability to experiment with various approaches, is particularly appropriate. Possible responses range from relying on the free market, to licensing polygraph examiners, to banning completely the use of polygraphs. While all sorts of variations on these approaches are possible, which precise approach is best for any given state should be left to the citizens of that state. We see no reason to curtail the vigorous debate on the issue continuing to take place within the states.

Further, the provisions of H.R. 1212 and S. 1904 violate the Administration's free market principles. The terms and conditions of private employment generally should be decided in the private marketplace, without unnecessary interference by the federal government. Absent some proof of impermissible discrimination, the Department of Justice knows of no compelling reason why the federal government in particular should interfere with an employer's judgment, or the techniques he or she uses to reach that judgment, on the credibility of employees or prospective employees.

In addition to federalizing the law in an area hitherto left to the states, and again bringing the federal government into the relationship between employer and employee, the Senate bill, S. 1904, contemplates the creation of a potentially expansive new federal bureaucracy for regulating polygraph usage, effectively creating a federal licensing scheme for polygraph examiners. ^{4/} The Secretary of Labor is given broad, virtually plenary, authority to establish standards governing individuals who, on the date of enactment, are qualified examiners under state law. ^{5/}

^{4/} H.R. 1212 would also grant the Secretary of Labor broad regulatory authority to effectuate the Act.

^{5/} The Secretary, however, is given little guidance regarding the standards that may be set; the act merely states that having performed a certain number of polygraph examinations in the past is an insufficient qualification. Under the

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Creating a new federal bureaucracy regulating the qualifications for a profession, a function that has historically been the prerogative of the states under their general police powers, would set a deplorable precedent. We know of no other profession that is subject to such a national regulatory scheme, and we see no justification for imposing the cost of administering such a regulatory bureaucracy on the federal taxpayers.

The fact that S. 1904 would allow the use of polygraph examinations in certain circumstances does nothing to lessen its preemptive effect upon state regulation in this area, or the intrusion of the federal government, once again, into the relationship between employer and employee. Our concern is not principally one that relates to the merits or demerits of the polygraph; rather, we oppose federalizing an area where the states are actively engaged in regulating -- choosing the solutions to the polygraph issue that best suit the needs and desires of their own residents. The fact that there is controversy over the reliability of the polygraph is an insufficient justification to federalize an area where the states have traditionally regulated. Indeed, the existence of such an ongoing debate is precisely the reason that the federal government should be reluctant to preempt this field through national regulation.

Finally, S. 1904 as passed by the Senate did not even include those few changes suggested by the Administration to make the legislation more workable -- expanding section 7(d) of the bill to permit polygraph use in the investigation of serious workplace problems that threaten the health and safety of employees, in addition to simple material loss; the designation of an agency other than the Department of Labor to establish standards governing certification of polygraph examiners; and the deletion of provisions that authorize private civil suits by employees or applicants against employers who violate the bill, which are unnecessary given the other enforcement mechanisms established by the legislation.

In all, H.R. 1212 and S. 1904 are simply irreconcilable with this Administration's stated philosophical views and goals. The Department of Justice recommends against the enactment of this legislation, and will recommend that the President exercise his veto should it be approved by Congress.

5/ (...continued)

bill as written, the Secretary could, if he or she chose, require that polygraph examiners have advanced degrees in law, medicine or psychology.

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The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Thomas M. Boyd
Acting Assistant Attorney General

Attachment